

United States
Circuit Court of Appeals
For the Ninth Circuit.

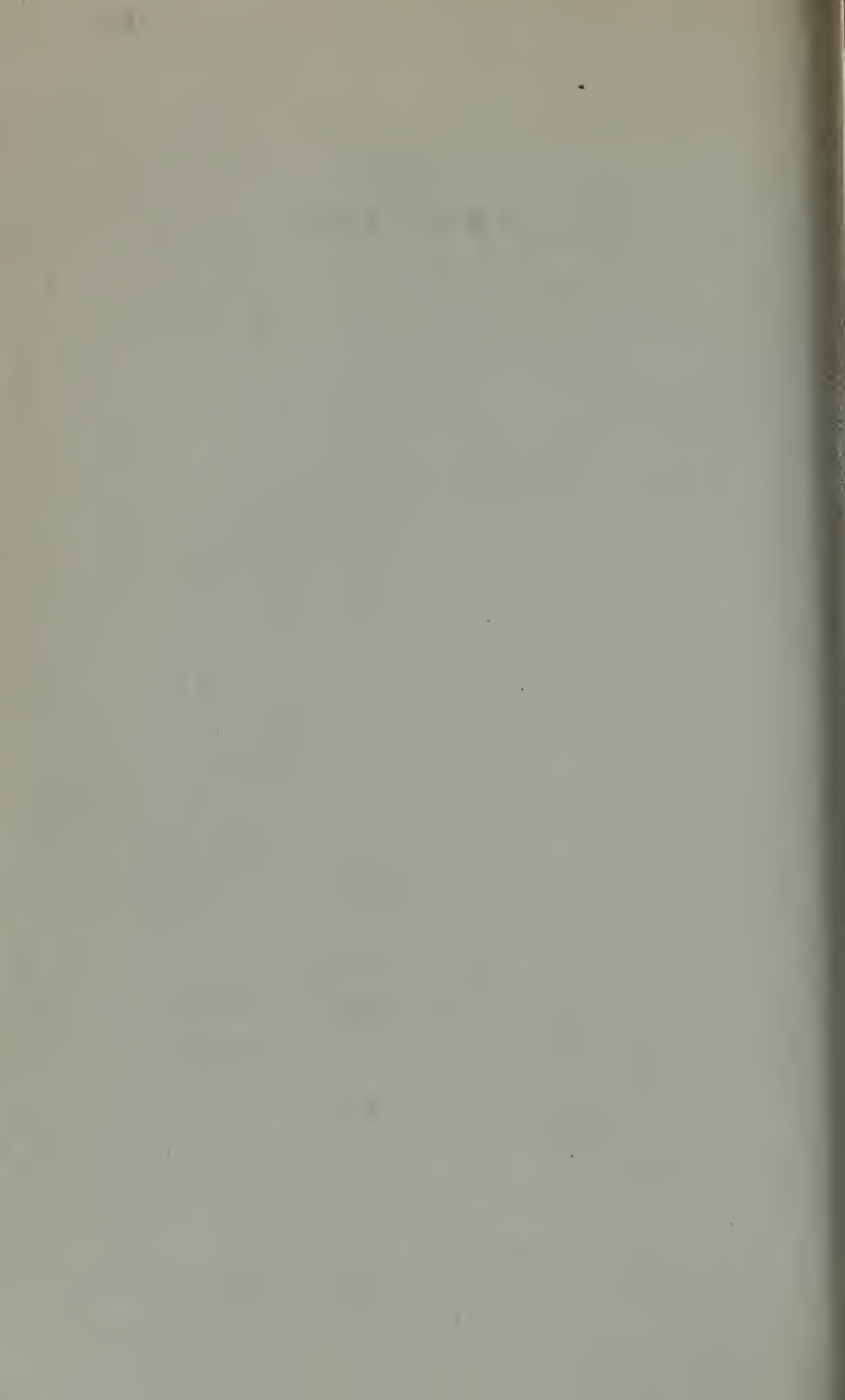
ALBERT J. GALEN,
Plaintiff in Error,
v.
UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

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Now comes the plaintiff in error, Albert J. Galen, and respectfully petitions this court for a rehearing for the reasons following:

1. Because the trial court did not find that Galen furnished the juror Warner with liquid refreshments as stated in the opinion of this court.

2. Because the trial court did not find that Galen promised to introduce the juror Warner to members of the legislature as stated in the opinion of this court.

I.

No finding that Galen furnished Juror Warner with liquid refreshments.

This court in the opinion says:

"On the charges of contempt the court below

found that during intervals of the trial of that case the plaintiffs in error knowingly visited and conversed with certain members of the jury, with a view of improperly influencing them in said case; that Galen so visited and conversed with the juror Warner, *and furnished him liquid refreshments*; that Kelly visited and conversed with the juror Brown and furnished him liquid refreshments; and that *both Galen and Kelly visited and conversed with the juror Warner, and promised to introduce him to members of the legislature then in session, to secure him support for a proposed bill which he was promoting.*" (Italics ours) (Rec. p. 288).

The trial court, after reviewing the testimony, said:

"Having in mind the charges and that the presumption of innocence requires their dismissal unless proven beyond reasonable doubt, and taking note of all matters and things in relation to witnesses and testimony that ought to be considered in the determination of issues, *the findings are* that during the trial of the original case *respondent Kelly* intentionally and knowingly visited and conversed with juror Brown, and likewise furnished said juror liquid refreshment and partook thereof with him; that said respondent likewise visited and conversed with juror Warner and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill; *that respondent Galen intentionally and knowingly visited and conversed with juror Warner.*" (Italics ours) (Rec. pp. 294 and 295).

The only finding against Galen is that he "intentionally and knowingly visited and conversed with juror Warner." The trial court not only did not find that Galen furnished the juror War-

ner with liquid refreshments, but expressly stated that this charge "fails of proof" (Rec. p. 288).

As a matter of fact no contention was made by the United States Attorney, either in his brief or in his oral argument before this court, that any such finding had been made by the lower court or that there is any proof to sustain the charge, but on the contrary he frankly stated to this court in his argument of the case that he had been misinformed or he would not have made such a charge in the information. His statement was in the nature of an apology for having made the charge.

This court, after having erroneously assumed that the lower court found that Galen had furnished liquid refreshments to the juror Warner, in the opinion says:

"The evidence that Galen drank with Warner consists in testimony that one evening during the trial a witness saw Galen standing in the hotel lobby, where he was joined by Warner, that after conversing about a minute, they went beyond and behind a post and out of the vision of the witness, whence the only outlets were the bar room entrance and a stairway descending to a toilet room, and the further fact that at the conclusion of the trial Warner admitted to the District Attorney that after having the talk with Galen, he and Galen went into the bar room, and had a drink."

The statement that the only "outlets were the bar room entrance and a stairway that descended to a toilet room," does not accord with the record

(Rec. pp. 164 and 167). The witness who testified to this incident merely stated that he saw Galen and the juror Warner go in the general direction of the bar room, but could not testify that they went into the bar room and acknowledged that they may have gone through some entrance to the street (Rec. pp. 162 to 167).

The admission of the juror Warner to the district attorney, that he had taken a drink with Galen, if any such admission was made, is certainly no proof of the fact. Such evidence was only admissible as impeaching testimony and not as substantive evidence. (Wigmore on Evidence, section 1018.) Both Galen and the juror Warner positively denied that any liquid refreshments were furnished and the juror denied having so admitted to Mr. Wheeler.

We submit that there is no evidence to sustain the charge and that the lower court could not have found otherwise than that the charge "fails of proof".

II.

No finding by lower court that Galen promised the juror Warner to introduce him to members of legislature.

Not only did the lower court fail to find that Galen promised to introduce the juror Warner to members of the legislature then in session, but

there is not a scintilla of proof in the record to sustain such finding. While the lower court did find that Kelly made such a promise to the juror Warner, the only finding against Galen is that he "intentionally and knowingly visited and conversed with juror Warner" (Rec. pp. 294 and 295).

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As this court affirmed the judgment against Galen on the erroneous assumption that the lower court found that he had furnished liquid refreshments to the juror Warner and had promised the juror to introduce him to members of the legislature, we submit that a great injustice has been done Mr. Galen, a distinguished and honorable member of the bar of Montana, and we have no doubt that this court will be glad to correct the mistake made. A person's reputation is a thing of great value and it should not be impaired or destroyed without just cause. It is needless to even suggest the effect upon Mr. Galen of the decision of this court in this case and a perpetual public record thereof.

In conclusion we submit that the finding of the lower court that Mr. Galen "visited and conversed with the juror Warner" should not have been made the basis of the judgment against him in the light of the testimony as to the circumstances attending such conversations and the nature thereof as disclosed by the record and fully presented in

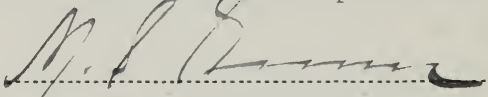
the brief and argument before this court in his behalf.

Respectfully submitted,
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Of Counsel for Plaintiff in Error.

CERTIFICATE OF COUNSEL.

THIS IS TO CERTIFY that the foregoing petition for a rehearing is, in my judgment, well founded and that the same is not interposed for delay.


One of the Attorneys for Plaintiff in Error.